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WT Docket No. 02-55

DA 05-3355

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Federal Communications Commission
Office of the Secretary

PETITION FOR RECONSIDERATION

Therefore, Petitioner hereby requests reconsideration of the Public Notice entitled *Wireless Telecommunications Bureau Reminds 800 MHz "Wave One" Channel 1-120 Licensees of Band Reconfiguration And Mediation Obligations*, WT Docket 02-55, DA 05-3355 (released December 30, 2005) ("*Public Notice*"). Although much of the *Public Notice* is helpful in summarizing the obligations of licensees involved in the reconfiguration process, a statement made within the *Public Notice* is in error and requires immediate correction so as not to confuse or mislead affected licensees.

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At Page 2 of the *Public Notice* within the final bullet point, the Bureau stated, “However, licensees who fail to reach a mediated agreement must bear their own costs associated with all further administrative or judicial appeals of band reconfiguration, including *de novo* review by PSCID and appeal of any such review before an ALJ.” In support of this statement, the Bureau cites paragraph 194 of Improving Public Safety Communications in the 800 MHz Band, *Report and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004) (*800 MHz Report and Order*). Yet, nowhere within the cited paragraph is there any finding by the Commission that such costs would be borne by an incumbent licensee.

A careful reading of the cited paragraph demonstrates that the sole cost imposed on incumbent licensees, including public safety and critical infrastructure operators, regarding the cost of dispute resolution, is found within the following relevant sentences, “Any party . . . may seek expedited non-binding arbitration which must be completed within thirty days of the Transition Administrator’s, or other mediator’s recommended decision or advice. The parties will share the cost of this arbitration.” *Id.* No other language appears within that paragraph which provides notice to incumbent licensees that they would be required to pay any costs in resolving disputes arising out of good-faith negotiations between themselves and Nextel. Accordingly, the above cited sentence within the *Public Notice* is not supported by the language contained within the *800 MHz Report and Order*.

Had affected licensees been given notice that the Commission intended to place them to the untenable burden of bearing the costs of dispute resolution and suffering the extreme disadvantage arising out of Nextel’s avoiding the costs of dispute resolution, then affected, incumbent licensees would have been given the opportunity to demand reconsideration or review of such a decision. No

such required notice and opportunity was given by the Commission and, thus, no such obligation can be found to exist despite the language contained within the *Public Notice*. For the Bureau to find otherwise would raise the issue of whether the Commission has complied with the notice requirements of the Administrative Procedures Act in this new interpretation of its decision. Similarly, the Bureau's interpretation is at odds with the language of the Commission's analyses in accord with the Regulatory Flexibility Act, since neither of the Commission's RegFlex analyses even hint that small businesses and small public safety operators would be placed to the burden of bearing the cost of dispute resolution.

Fortunately, the Bureau is not put to the burden of having to interpret the relevant language contained at paragraph 194 of the *800 MHz Report and Order*. The Commission already stated clearly what the duties of the affected licensees are, interpreting its own *800 MHz Report and Order*, within the subsequent *Supplemental Order and Order on Reconsideration*, WT Docket 02-55 (released December 22, 2004) (*Supplemental Order*). At paragraph 15 of the *Supplemental Order* the Commission stated,

“[w]e emphasize here that incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs – including the costs of preparing the estimate, negotiating the retuning agreement, and resolving any disputes – lies with Nextel. (emphasis added).

The cost of an affected licensee's participation in proceedings to resolve disputes is, therefore, wholly Nextel's. The Commission's language does not limit Nextel's burden in any manner and none may be presumed by the Bureau. As the Commission stated with emphasis and without

question, "incumbents should incur no costs for band reconfiguration."¹ There is, therefore, no way that the Bureau can reconcile the contents of the cited sentence within the *Public Notice* and the Commission's clear statement.

Nothing contained within this Petition is to suggest that any incumbent should act in any manner which does not reflect fully the good-faith requirements contained in the Commission's orders. Indeed, this Petition fully rests on the expectation that incumbents will perform in good faith. However, it is not inconceivable that parties negotiating in good faith might, nonetheless, fail to come to terms. And given the automatic referral to the PSCID following a thirty-day period before the Transition Administrator, a good faith incumbent would necessarily be put to the cost of resolving the dispute, contrary to the Commission's *Supplemental Order*. Such a situation was not intended and is specifically rejected by the Commission. Instead, the Commission stated that the means by which it will assure good faith participation by incumbents is through its enforcement powers, not through its leveling of additional, unwanted costs on incumbent licensees.

The Commission's position is well taken. It cannot escape notice that incumbent licensees would not be involved in any stage or phase of negotiation or dispute resolution but for Nextel's desire to reconfigure the band and incumbents' subsequent requirement to participate in such reconfiguration. Thus, the costs of dispute resolution arise directly as an entirely expected and foreseeable result of the requirements of reconfiguration and should be subject to recapture from Nextel. To now act as though dispute resolution was otherwise unexpected or not one of the costs considered by the Commission is simply incorrect. Finally, it should not escape the Bureau's notice

¹ The Commission limited reimbursable costs to only those which are reasonable and prudent, however, the Commission within its statement has concurrently declared that dispute resolution costs are among those deemed reasonable and prudent.

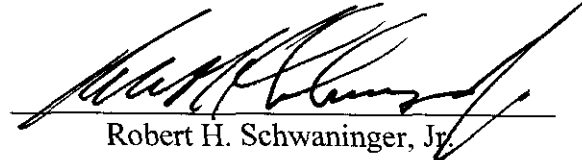
that Nextel is already paying for dispute resolution in the form of millions of dollars for the operation of the Transition Administrator, which has as one of its primary functions mediation of disputes. Accordingly, it would be inequitable to allow a third party Transition Administration to obtain full compensation from Nextel, while simultaneously depriving incumbent licensees the same.

Prior to its entrance into agreement with the Commission, Nextel was provided every opportunity to consider the effect upon its financial resources of the adoption of the *800 MHz Report and Order*, including all subsequent rulings by any relevant agency or fora. Similarly, Nextel has been provided every opportunity to request reconsideration of the Commission's *Supplemental Order*, including that language cited herein. Nextel has not eschewed its obligation and has not sought any relief from its obligation to bear all costs of reconfiguration, including the costs related to resolving disputes. Therefore, the Bureau cannot, on its own motion, interpret Nextel's duties in a manner which is at odds with the Commission's plain statements and concurrently alter materially the obligations of affected licensees. Any such action would require further rule making proceedings, including adequate notice and comment by interested persons.

Therefore, for the above stated reasons and consistent with the Commission's relevant orders, Petitioner hereby respectfully requests reconsideration of the Bureau's *Public Notice* and correction of same to make it consistent with the Commission's orders and relevant law.

Respectfully submitted,

SCHWANINGER & ASSOCIATES, P.C.



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